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No. 894

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

ROBERT HARTGRAVES,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner Robert Hartgraves respectfully prays that a writ of certiorari be issued to the Supreme Court of Illinois to review its decision affirming a judgment of conviction in the Criminal Court of Cook County, Illinois adjudging petitioner guilty of the crime of arson and sentencing him to a term of four to eight years in the penitentiary.

In advance of the trial to a jury, petitioner filed his motion to suppress the confession and a hearing was held thereon. The court held the confession to be proper against the contentions of the defendant that it was secured in violation of petitioner's constitutional right to be advised that he did not have to make any statements and contrary to petitioner's further contentions that he was beaten and threatened.

OPINION BELOW

The judge who held the hearing on the petitioner's motion to suppress the evidence denied the motion.

The opinion of the Supreme Court was first handed down on September 29, 1964 (R. 4).[1] Upon Petition for Rehearing (R. 12), the opinion was modified upon the denial thereof on November 23, 1964 (R. 13) and is reported, as modified, in 31 Ill. 2d 375. It is also printed in this Petition as Appendix "A"

JURISDICTION OF THIS COURT

1. The date of judgment sought to be reviewed was entered on November 23, 1964, when the petition for rehearing was denied (R. 13). This petition for a writ of certiorari is filed within ninety days from said denial.

2. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1257(3) and Rule 22(1) of the rules of this court.

QUESTIONS PRESENTED FOR REVIEW

1. May a confession properly be admitted against a defendant who was not advised of his right to counsel by the police and who was not advised that what he said might be used against him in a subsequent legal proceeding?

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[1] "R" refers to certified Record as filed in this court.

2. Is the Illinois court correct in reading *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. ed. 2d 977, as not ". . . requiring the rejection of a voluntary confession because the State did not affirmatively caution the accused of his right to have an attorney and his right to remain silent before his admissions of guilt," when this court has affirmatively stated to the contrary?

3. Where Illinois has interpreted this court's *Escobedo* decision differently from Oregon (*State* v. *Neely*, Sup. Ct. Ore.,—Oregon—395 P. 2d 557, Sept. 30, 1964) and from California (*People* v. *Dorado*, 40 Calif. Reptr. 264, 394 P. 2d 952, Sept., 1964) ought not this court take jurisdiction in order to set out more clearly its holding in *Escobedo* as a guide to all of the State tribunals?

4. Where the evidence is vague and uncertain as to whether defendant was permitted to make a phone call upon his request in advance of his confession and where the evidence of beating, threat and promise is clear, should a confession obtained be permitted into evidence?

CONSTITIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States.

The Sixth Amendment to the Constitution of the United States.

The Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE.

In advance of his arson trial defendant filed his verified petition to suppress the confession and a hearing was held thereon. The court denied the motion, admitted the confession, the case went to the jury and the defendant was convicted and sentenced. Without the evidence of the confession, there were no facts upon which a conviction could be had.

EVIDENCE ON BEHALF OF DEFENDANT IN CONNECTION WITH THE MOTION TO SUPPRESS

The verified petition of defendant to suppress the confessions was made in advance of trial and a hearing was held thereon (A. 3-34).[1] The defendant testified he was 26 years old, completed one year high school, was married and had two children. He was arrested by three police officers at about 9:00 or 10:00 P.M. on May 16, 1962. Two years prior he was in an automobile accident and had an operation on his right shoulder and had steel wires in it. His left arm had a cut with four stitches in it. At the time of his arrest the cut was not bothering him. When he left the police automobile, an officer got in back of him and twisted his right arm up. He told the officer he had an injury and asked him not to twist the arm because he couldn't stand it being twisted. They shackled his hands behind him and took him to the police station (A. 3).

He was not allowed to use the telephone by the detectives in the interrogation room (A. 4). During the interrogation they asked him if he lit the fire and he denied it. A couple of hours later they removed his handcuffs (A. 4). He was questioned continuously from the time he was brought

[1] "A" refers to printed Abstract of Record as filed in Supreme Court of Illinois.

to the station until 1:30 in the morning when he signed a confession (A. 4-5). Someone came into the room and told him that if he didn't confess they were going to throw him in a cell with a bunch of crazy dope addicts (A. 4). An officer twisted his arm in back of him and they bumped up against the cut he had on his left arm and as a result it started bleeding. When his arm was twisted behind him he had pain in his right shoulder (A. 4). One heavy-set detective told him that he wouldn't have to worry about his shoulder any more if he didn't sign the statement (A. 5). A short detective told him that he would make it so miserable for his wife that she would not be able to find a job anywhere to support his child, and his child would go to a home (A. 5). He was not given anything to eat or drink although he saw Johnny Owens and Marge Helmer (two potential state's witnesses) sitting in the next room eating sandwiches and drinking milk shakes (A. 5).

He asked for permission to make a phone call to his wife. The detective told him he could not make a phone call, but that after he was booked, he could then make a phone call (A. 5).

At the time he signed the statement he was nervous, he couldn't think straight, both arms were hurting him, he had no water and his throat was dry. The detectives kept reminding him about his wife and child. His wife was pregnant at that time and the detectives said that they would bother her constantly (A. 5). After he signed the first statement, he was then questioned by an assistant State's Attorney in another room. While he was being questioned he was shown statements made by John Owens and Marge Helmer (A. 6). The statement he signed was not true (A. 6). He later made a statement containing much the same information as the first statement at about

10:00 or 11:00 o'clock in the morning (A. 6). He complained to the assistant State's Attorney that his left arm was bleeding and asked if they could take care of it and get some bandages. A doctor was called to attend to his wound (A. 6). He had received the wound three days before at work and the wound had been stitched up. It was caused to bleed by the detectives who pushed him around and bumped his arm (A. 6). He had not been allowed to make any phone calls up to the time of the second statement, although he made requests so to do. "I wanted to call somebody to get a representative, somebody to talk for me. They wouldn't let me talk—" (A. 6). He did not tell the assistant State's Attorney that his prior statement was not true because the two detectives had warned him that if he mentioned anything other than the statement that he gave that they would take care of his wife and kid (A. 6). When he was released on the following day on bond he sought medical attention from his family doctor who treated him for nerves, for the cut on his arm and for his right shoulder (A. 7).

Muriel Hartgraves, wife of the defendant, testified she was a secretary to the admitting officer at Presbyterian-St. Luke's Health Center. Before her husband was arrested, his shoulder injury had not been bothering him. When she saw her husband on the day he was released on bond she noticed that the bone in his right shoulder was sticking up just above where the incision was made. She and her husband went to the doctor (A. 10).

Dr. Herbert Shermer testified he had treated the defendant after an automobile accident in 1959 for a separation of the right shoulder joint. An operation had been performed in which separate bones were pinned together and wires were attached around them. He saw the defendant on May 18, 1962, in his office. Defendant complained he

was nervous, upset and had pain in his right shoulder. The pain was in the same location where the operation took place. The type of injury which the defendant had would cause pain if pressure were put upon the shoulder. He gave the defendant an injection, prescribed sedatives and recommended heat for the shoulder joint (A. 11).

EVIDENCE FOR THE STATE ON THE MOTION TO SUPPRESS THE CONFESSION.

Detective John Weiss said that he and detective Wilkins arrested the defendant at about 11:00 P.M. on May 16; that defendant was not handcuffed at that time; that defendant walked to the squad car and was taken to the police station where defendant was interrogated; that he did not threaten the defendant nor did he tell the defendant that his child would be taken away from him or that something would happen to his wife; nor did the witness touch, beat, hit or strike the defendant or grab his left arm. He did notice some stitches on defendant's arm at the time of taking a written statement (A. 12). Defendant asked to make phone calls after the oral questioning (A. 12). After the oral questioning the defendant gave a written statement. Previous to the written statement defendant was shown the statement taken away from Johnny Owens; also parts of a statement given by Margie Helmer were read to him. When defendant was first told that Owens and Helmer had stated that he was the one who started the fire defendant said, "They are both liars" (A. 13). During the time the defendant was being questioned and during the written statement the witness noticed the defendant's left arm was bleeding. He examined the wound and called Dr. Rose of the police department. The wound was a bit festered and Dr. Rose came over, cleaned up the wound and put a bandage on it (A. 14). The written statement was signed at about 3:30 or a quarter to

4:00 in the morning. Up to this time the defendant had asked to make phone calls and he was permitted to make a phone call. "I don't know whether he called his wife—I'm pretty sure he called his wife from the police building." (A. 14).

> "Q. At any time had you suggested any answers that he make in statements that he would give to the police or State's Attorney?
>
> A. Well, he wanted to know what the outcome would be. We asked him if he had a record. He said no, he never had no record. So he asked us if he had to get an attorney, and we advised him that it would be advisable to get an attorney, yes." (A. 16).

On cross examination, officer Weiss testified when the defendant was arrested he was handcuffed with his hands in front of him (A. 16). The defendant was taken to an interrogation room at the Central Police Station. There were two telephones in the room. The officer was with the defendant constantly and never left the room. During that time the defendant made a phone call after the statement was taken (A. 17).

> "Q. Did you tell him before he made the statement he could use the phone if he wishes?
>
> A. No, I did not. In fact he didn't ask." (A. 17).

From the time the defendant entered the office until the time the written statement was taken, the defendant never got out of the chair. When the officer explained to the defendant that Margie Helmer and Johnny Owens made a statement about the fire, the defendant called them a bunch of liars (A. 18). The officer brought Owens to defendant's presence. From the start, the defendant refused to make a statement (A. 18).

> "Q. Did you tell him it would go easier on him if he made a statement?

A. It would be easier on him if he did make a statement if he was involved in it, yes.

Q. Did you tell him you might try to help him in court if he made a statement?

A. We do everything we can, because he said he had no record and never been arrested before.

• • •

Q. You knew it was true that he had never been arrested before; you checked his record?

A. We checked the record, yes.

Q. You knew that he hadn't been arrested before.

A. That's right.

Q. And you told him it would go easier for him in court if he made a statement.

A. Well, we did, yes." (A. 18-19).

Between the time of defendant's oral statement and written statement officer Weiss left the room in order to book the prisoner. When he left the room, detective Wilkins was with the defendant. There were stenographers on duty in the building, but they were not called to take the written statement. His partner, detective Wilkins took the statement. At no time during the taking of the written statement did he tell the defendant that the defendant did not have to answer questions if he did not want to (A. 19).

He called the police doctor at about 10:00 o'clock in the morning because the defendant's arm looked as though it was festering. It was yellow-looking (A. 19). On the morning of May 17, a weekday, there were four courtrooms in session in the building where the defendant was being interrogated, but no one took the defendant before any judge. They were still in the process of questioning (A. 19). The defendant was in the arson unit office until

about 7:00 o'clock in the morning and then went back to the lock-up for several hours. At about 9:30 A.M., the officer got the defendant from his cell and took him to where the press was in order that the press could take television and movie pictures of the defendant (A. 20).

Between the defendant's oral statement and his first written statement, the defendant asked, "Will I need a lawyer?" and the witness said, "Yes, I think you will." (A. 20). The witness did not offer to let the defendant use the phone to call a lawyer. After the oral statement, the defendant said he was worried about his wife because she was going to have a baby any day; and he also told the witness he was concerned about what might happen to his other child (A. 20-21).

Dr. Louis Rose, a police department physician, testified he was summoned at 10:00 A.M. on May 16, 1962, to clean a sutured wound on defendant's arm and change the dressing. The wound was not bleeding when he saw it. There were five stitches in the wound (A. 21).

Assistant corporation counsel John Thornton testified he saw the defendant at 8:00 o'clock in the morning on May 17, 1962 in the office of an assistant State's Attorney and that while he was there for five minutes nobody in his presence threatened or beat the defendant; nor did the defendant complain to anybody that he was beaten (A. 22).

An investigator for the National Board of Fire Underwriters, Frank Grady, testified he saw the defendant on May 17, 1962 in the police interrogation room at about 1:00 A.M.; the defendant was sitting at a desk talking to detectives Weiss and Wilkins and to fireman Carl Scheel.

While he was in the room during the questioning he did not hear anyone threaten or strike the defendant; nor did he hear anyone say that defendant's child would be taken from him or that anything would happen to his wife (A. 23). While defendant was being questioned, defendant was shown the statements of Marge Helmer and John Owens. When the defendant signed the statement defendant was not threatened in any way nor was defendant promised any immunity (A. 23-24). The witness was present in the assistant State's Attorney's office in the police building some time after 8:00 o'clock in the morning when defendant signed another statement. He did not see anyone strike or threaten the defendant in any way. He did notice a cut on defendant's arm which was festering in some way (A. 24).

He noticed the defendant's left arm was cut shortly after defendant arrived at the police station at about 12:30 or 1:30 in the morning when defendant was brought in by the police officers. There appeared to be a couple of stitches on defendant's arm which appeared to be festering, by which he meant "swollen" and maybe a little pus on the wound. At that time nobody made any attempt to get a doctor for Hartgraves (A. 25). When he was in the interrogation room between midnight and 2:00 A.M. in the morning on May 17 he did not hear any mention of the word attorney, nor did he see defendant make any phone calls.

Detective George Wilkins testified he arrested the defendant about 11:00 P.M. on May 16. The defendant "voluntarily" accompanied him to the squad car. Defendant was handcuffed at that time (A. 26). Neither on the way to the police headquarters nor in the interrogation room did anyone threaten the defendant, twist his arm or hit his shoulder; nor did anybody threaten to do anything with respect to defendant's wife or child.

The defendant had a laceration on his left arm about two inches which looked infected (A. 26). After the defendant was questioned by officer Weiss and after a written statement was taken and after defendant was taken to the scene of the fire for a re-enactment and after defendant was taken back to police headquarters at 10:00 o'clock in the morning a doctor examined the defendant and bandaged the arm. The witness was present when an assistant State's Attorney took another statement from the defendant after 10:00 o'clock in the morning, which was never signed. Previous to the statement given to the assistant State's Attorney, defendant had not been threatened or physically hit or punched by anybody in his presence; nor did defendant complain of any injury to his left arm (A. 27).

On cross examination the witness said that when Hartgraves was arrested he handcuffed the defendant to his partner Weiss and that Hartgraves and Weiss walked to the squad car as they were cuffed together (A. 28).

Before the defendant made his oral statement there was some mention made of the defendant's wife being pregnant (A. 29).

The witness could not say whether officer Weiss promised the defendant anything for making his oral statement because he was not in the room during the time when Weiss had the conversation alone with the defendant (A. 30).

Isabel Byrnes and Jerome Miller, testified that when they saw defendant during the time he was being interrogated by Mr. McCarthy, they did not see anybody hit or threaten the defendant nor did the defendant complain about any injuries. This was some time around 11:00 A.M. on May 17, 1963 (A. 30-31).

Fireman Carl Scheel testified that he assisted in the questioning of the defendant at police headquarters on May 17, 1962, and he did not see anybody strike the defendant nor did he hear anybody threaten the defendant or induce him to give a statement. He did notice the wound on defendant's left arm when they first arrived at police headquarters (A. 31).

Former assistant State's Attorney Daniel McCarthy testified he saw the defendant at about 11:15 on the morning of May 17, 1962 and during that time defendant made no complaints, nor did anybody threaten the defendant or induce him to make a statement in his presence. During the questioning defendant indicated he would be willing to sign a statement, but when the witness later asked the defendant to sign the statement, defendant stated he had employed counsel and declined to sign it (A. 32). (The witness asked the defendant to sign the statement the next day, on May 18, by which time the defendant had counsel.)

Marjorie Helmer testified for the state that she saw the defendant put in the police car and she rode to the police station in the same car. Nobody struck or abused the defendant on the way to the police station. She was in an adjoining room at the police station when the defendant was being questioned and she did not hear him questioned nor did she see him abused or struck.

> "Q. And did you hear anyone threaten to have his child taken from him?
>
> A. No. The only thing he did ask is to call his wife because she was pregnant at the time." (A. 32-33; R. 318).

After defendant left the police station in the company of officers and then returned, she noticed the defendant had a cut on his left arm, ". . . but they bandaged it right before they brought him in." (A. 33; R. 321).

On cross examination, Mrs. Helmer testified that when the police put the defendant in the car, they did not handcuff him; officer Wilkins took the defendant by the elbow and they walked to the car. Then the defendant was handcuffed. While she was in the adjoining room and heard defendant being interrogated, she heard him ask for permission to call his wife because his wife was pregnant and the witness thought that they let him call his wife. When the defendant got into the police car at the time of the arrest, she noticed a cut on his arm because he only wore a white T shirt (A. 33).

The court denied the defendant's motion to suppress the confessions (A. 34).

EVIDENCE FOR THE STATE ON THE CASE IN CHIEF.

The state presented evidence to the effect that there was a fire at 3356 West Grand Avenue, Chicago in the early morning of April 1, 1962. The fire was of undetermined origin (A. 34-35). Officer Weiss testified that he arrested defendant on May 16, 1962, at about 11:00 P.M. and that defendant made an oral and written statement admitting that he started a fire in the building at the behest of one, Joseph Kanovski, who paid him $100. People's Exhibit 3 was a signed statement taken from the defendant in which defendant gave details of setting a fire by throwing his cigarette on some rags, paper and other debris (A. 35-37).

On cross examination, the following occurred with respect to the taking of the statement by officer Weiss from defendant.

"Q. You told him it would go easier for him in court if he made a statement, didn't you?

A. Well, there wasn't any—

Q. The question is did you tell him it would go easier for him in court if he made a statement?

A. Yes, I did. (A. 39)

Q. Now, during the taking of these statements in question did you tell him he had a constitutional right not to answer questions?

A. No, I didn't.

Q. Did you tell him he didn't have to answer any question if he didn't want to?

A. I did not.

Q. Did you tell him the answers to the questions might be used against him?

A. I didn't." (A. 39-40).

People's Exhibit 3, a confession signed by the defendant, was introduced into evidence and read to the jury over defendant's objections (A. 47). It was a statement taken from the defendant on May 17, 1962 at 1:30 in the morning which stated that he set fire to the building at 3356 West Grand Avenue on April 1, 1962, because Joe Kane asked him if he wanted to make $100 to flip a cigarette onto some oily rags in the rear of the tavern. At first he didn't want to do it. On April 1, he was with Johnny Owens and he decided not to do it but Johnny grabbed him by the arm and told how easy it was to make $100. They had a few drinks; and some time after 3:30 in the morning when he saw all the people leave the tavern he entered the rear door and flipped a cigarette

onto the oily rags and he then departed. A couple of days later Joe Kane gave him $5.00 and he received $5.00 periodically after that (A. 47-48).

People's Exhibit 12, an unsigned statement transcribed by a court reporter taken on May 17, 1962 at 11:20 A.M. in the presence of an assistant State's Attorney, a detective and a secretary was also introduced into evidence over defendant's objections. That statement contained approximately the same matters as contained in People's Exhibit 3 (A. 51-52).

EVIDENCE FOR THE DEFENDANT ON THE CASE IN CHIEF.

The defendant testified he was married, had two children, had gone to one year high school, was employed at the Crescent Cardboard Company for about two years; that on March 31, 1962, he had been in the tavern at 3356 West Grand Avenue, but left there at 2:00 o'clock in the morning on April 1 and had gone home to bed. He had nothing to do with setting a fire. He signed People's Exhibit 3 because his arm was twisted, he was threatened that the officers would make it rough on his wife and that his child will be put into a home and that his wife would be constantly bothered by them; that they threatened to throw him in a cell with a bunch of crazy dope addicts. The statement he signed was not true. He received part of the information that dealt with the fire from statements that Owens and Helmer had made and what the police had told him (A. 55-58). On cross examination he stated that his wife saw him on television on May 17 and made arrangements to get a lawyer (A. 59).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

Where a defendant is not advised that he had a constitutional right not to answer questions, does the holding in Escobedo v. *Illinois require the suppressing of a confession made?*

A. *Should the holdings of California (People* v. *Dorado,* 40 Cal. Rptr. 264, 394 P. 2d 952, Sept. 1964) *and Oregon (State of Oregon* v. *Neely,* 395 P.2d 557, Sept. 1964) *interpreting Escobedo be upheld as against Illinois' contention rejecting the California and Oregon interpretation?*

There is scant disputation about the facts. The arresting officer who was interrogating the defendant in the early morning hours of May 17, 1962, testified he told the defendant, " . . . it would be easier for him in court if he made a statement." (A. 39).

> "Q. Now during the taking of these statements in question did you tell him he had a constitutional right not to answer questions?
> A. No, I didn't.
> Q. Did you tell him he didn't have to answer any questions if he didn't want to.
> A. I did not.
> Q. Did you tell him the answers to the questions might be used against him?
> A. I didn't." (A. 39-40).

Escobedo v. *Illinois* 378 U.S. 478, 84 S.Ct. 1758, 12 L.ed. 2d 977, was decided in June, 1964. Since then, and even now, throughout the land, a variety of judicial interpretations has been placed upon the holding of that case with

results, as is shown here, of a contrary nature. The essence of this court's decision in *Escobedo* is:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' * * *". 378 U.S. at 490, 84 S.Ct. at 1765, 12 L. Ed. 2d at 986.

How then are the courts to interpret this ruling? The Supreme Court of Oregon decided in *State* v. *Neely*, 395 P. 2d 557, at 559:

> "Neely did not request the assistance of counsel; therefore, one of the critical facts present in the *Escobedo* case is absent here. Whether such a request is necessary before an accused can successfully contend he was deprived of his right to counsel we do not now need to decide.
>
> "In the previously-quoted statement of the crucial elements in the *Escobedo* decision, the fact that the defendant had not been informed of his right to remain silent was specifically stated. The majority reiterated that fact in other portions of its opinion . . ."

Oregon, therefore decided, p. 561,

> "We conclude that the *Escobedo* decision requires that an accused be effectively warned of his constitutional right to remain silent and that if this is not affirmatively shown by the state, a confession obtained

without such warning is inadmissible. Whether law enforcement officers must in addition advise an accused of his right to counsel and whether it is necessary that this advice be given by a magistrate we need not now decide."

Neely, relied both on *Escobedo* and the holding of the Supreme Court of California in *People* v. *Dorado*, 40 Cal. Rptr. 264, 394 P.2d 952. *Dorado* held that a confession was inadmissible because the interrogating officer had not advised the accused of his right to remain silent and his right to counsel.

Illinois, on the other hand, rejected this interpretation of *Escobedo*. It also rejected the holding of *Haynes* v. *State of Washington*, 373 U.S. 503, 10 Ill. Ed. 2d 513, and stated:

> "In coming to this conclusion we are mindful of apparently contrary conclusions reached in *State* v. *Neely* (Sup. Ct. Oregon, September 30, 1964) ..... Oregon ....., 395 P.2d 557; and *People* v. *Dorado*, 40 Calif. Rptr. 264, 394 P.2d 952. In the Oregon case the court held a confession inadmissible, concluding that the *Escobedo* decision required that the State must effectively show that the accused was affirmatively warned of his right to remain silent prior to confessing. In the *Dorado* case a divided California court, also relying on *Escobedo*, struck down a confession because the accused had neither affirmatively waived his right to counsel nor had been affirmatively advised of such right. In the *Dorado* case it should also be noted that the accused was interrogated while an inmate of a penitentiary and under prison discipline.
>
> "We do not, however read the *Escobedo* case as requiring the rejection of a voluntary confession because the State did not affirmatively caution the accused of his right to have an attorney and his right to remain silent before his admissions of guilt." (Appendix A, pp. App. 4-5).

But see *Miller* v. *Warden, Maryland Penitentiary,* 338 F. 2d 201, 4 Cir., Oct. 29, 1964 relying on *Escobedo,* which held contrary to Illinois and held invalid a Maryland conviction predicated upon a confession secured while police denied suspect the right to use a phone to call his family or an attorney.

Accordingly, the issue is clear. There are different holdings in the highest courts of at least three states interpreting *Escobedo.* We respectfully submit this is a compelling reason for the grant of this court's writ of certiorari to clarify the Escobedo holding so that there may be no equivocation by the states in interpreting the holding.

II.

The confession was obtained by virtue of the physical abuse. Petitioner's will to resist was overcome.

Defendant had a broken shoulder which was pinned together with wires (A. 3). He also had four stitches on his arm as a result of an accident in his factory (A. 3). Defendant testified that the police wrenched his arm behind his shoulder (A. 3) and further threatened that his shoulder would be of no use to him if he did not confess (A. 5). He said that his arm was hurting him (A. 4).

The officers denied, of course, mistreating him in any way—that they wrenched his shoulder, that they twisted his arm or that they threatened him in any way.

But the evidence is a little confusing—and even conflicting—with respect to the incidents at the time of his arrest. Defendant testified that as he was arrested at 11:00 P.M., his hands were cuffed behind his back (A. 3). Officer Weiss testified defendant was handcuffed with his hands in front of him (A. 16). Officer Wilkins testified that he handcuffed Hartgraves to his partner officer Weiss and that Weiss and

Hartgraves walked to the squad car together (A. 28). State's witness Marjorie Helmer testified that when the police put the defendant in the car they did not handcuff him (A. 33). Officer Wilkins took the defendant by the elbow and they walked to the car. Inside the car the defendant was handcuffed (A. 33).

Many individuals noticed the sore on defendant's arm which was festering. Mrs. Helmer testified that defendant wore only a white T shirt and she could notice the cut on his arm when he got into the police car (A. 33). Defendant testified both his arms were hurting him (A. 5). Officer Weiss testified that during the time that defendant was being questioned and during the taking of the written statement he noticed defendant's left arm bleeding (A. 14). Of course, he did not call the police doctor until the next morning. The pain to the defendant would aid his willingness to give a confession, Officer Weiss did notice that defendant kept rubbing his arm and did notice the wound on defendant's left arm (A. 19). Fire investigator Frank Grady testified he noticed defendant's left arm was cut shortly after defendant arrived at the police station and that there appeared to be a couple of stitches which appeared to be festering. By festering Grady meant "swollen", and meant that there was a little pus or some kind of fluid in the wound (A. 25). Of course, he made no attempt to get a doctor for Hartgraves (A. 25). Detective Wilkins testified the first time he noticed that there was an injury to defendant's left arm was during the time of the oral statement. He believed Officer Weiss called it to their attention. He did not notice the wound at the time of the arrest on the street nor did he recall whether the defendant was in shirt sleeves at the time of his arrest. Nobody attempted to get the defendant a doctor at that time (A. 29-30).

By the time Hartgraves had signed his statement at about 3:30 or 4:00 A.M. in the morning and after he had been taken to the scene of the fire for a re-enactment he was then taken back to the police station. The police officers decided to dress up Hartgraves before they brought him into the office of the assistant State's Attorney for a further statement; and so, the police doctor was called at 10:00 A.M. in the morning for the purpose of dressing the wound. Dr. Rose cleansed the wound and changed the dressing (A. 21).

Mrs. Muriel Hartgraves, wife of the defendant, testified that when she saw her husband on May 18, she noticed that the bone in his right shoulder was sticking up but that before he was arresting the shoulder injury had not been bothering him since the operation (A. 12). Upon being released on bond on May 18, the defendant went to his doctor for medical treatment. Dr. Herbert Shermer testified he was the physician who operated on the defendant two years prior when the defendant had a separation of the collar bone from the acromion, another bone in the shoulder. An operation pinned the two separate bones and the doctors attached wires around them (A. 11).

Dr. Shermer testified that the defendant came to him on May 18th and complained of pain for which the doctor gave the defendant an injection and prescribed sedatives. Dr. Shermer also testified that the type of injury which the defendant had would cause pain if pressure were put upon the shoulder and further, that real severe pressure on the shoulder might cause a separation to occur (A. 11-12).

Under the totality of the circumstances here, where defendant is corroborated in his accusations, is not the confession here extorted by both the physical mistreatment of

the defendant and the threats made against him in connection with his shoulder? The defendant had no reason not to believe that the police had ample power to carry out their threats. *Lynumm* v. *Illinois,* 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed. 2d 922.

The totality of circumstances here evidenced an involuntary written admission of guilt. (*Haynes* v. *State of Washington,* 373 U.S. 503, 10 L.Ed. 2d 513.)

CONCLUSION.

We respectfully submit the petition should be granted.

Respectfully submitted,

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and
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